

BEFORE THE
POSTAL REGULATORY COMMISSION
WASHINGTON, D.C. 20268-0001

RULES FOR MARKET TESTS OF
EXPERIMENTAL PRODUCTS

Docket No. RM2013-5

INITIAL COMMENTS OF THE UNITED STATES POSTAL SERVICE
(September 20, 2013)

The United States Postal Service hereby submits its initial comments on the proposed rules for Postal Regulatory Commission review of market tests of experimental products under 39 U.S.C. § 3641.¹

Overall, the Postal Service is encouraged by the prospect that a set of rules in harmony with section 3641 can bring great clarity to both the process under which the Commission reviews Postal Service market test proposals and the Postal Service's market test reporting obligations. In the main, the rules proposed by the Commission reflect that it has benefitted from its review of the various market test proposals submitted by the Postal Service since the December 2006 enactment of the Postal Accountability and Enhancement Act (PAEA). However, the Postal Service is concerned that certain aspects of the proposed rules are either contrary to the intent of section 3641 or could benefit from further clarification.

As discussed in greater detail below, the Postal Service recommends that the Commission strive to revise or clarify the proposed rules:

¹ Docket No. RM2013-5, Order No. 1803, Notice and Order of Proposed Rulemaking Establishing Rules for Market Tests of Experimental Products (August 9, 2013), (hereinafter, Notice of Proposed Rulemaking).

- (1) The proposed rules appear to require that the Postal Service submit detailed Mail Classification Schedule language as part of each market test notice. The Postal Service is concerned that such a requirement is inappropriate and would counterproductively limit the flexibility necessary to incubate and test a product concept.
- (2) The proposed rules seek to require the reporting of “administrative” and “ancillary” and “start-up” costs during the conduct of each market test. To better ensure that it consistently meets the Commission’s expectations, the Postal Service would benefit from greater clarity regarding the Commission’s interpretation of these terms.

I. *Mail Classification Schedule Language*

At page 5 of its Notice of Proposed Rulemaking, the Commission indicates that its general intent is to “not require the Postal Service to provide more information than it currently does for market tests.” It then describes three additional market test notice requirements² as the “only additions” and ones that are necessary to comply with subsections 3641(d) and (e). However, the rulemaking notice does not acknowledge a fourth additional proposed requirement. As drafted, Rule 3035.3(b)(5) also would require that any Postal Service notice seeking review of a market test also include “proposed Mail Classification Schedule [l]anguage.” The Commission’s rulemaking notice does not reference a statutory mandate for such a requirement or explain why it is otherwise now desirable.

² Pertaining to beginning and end dates, annual revenue estimates, and geographical markets of each test.

Postal Service market test notices are required to meet the requirements of subsection 3641(c)(1)(B) and to describe the nature and scope of the experimental product. Subsection 3641(a)(2) is explicit in declaring that a product being tested is not subject to the requirements of sections 3622, 3633, or 3642, or regulations promulgated thereunder. Product concept refinement and the development of appropriate Mail Classification Schedule (MCS) language for a potential permanent service offering are core objectives of market testing. Accordingly, the apparent Rule 3035.3(b)(5) prerequisite to market testing -- that the Postal Service develop and submit a product description in the form of Mail Classification Schedule that otherwise would be required for permanent products -- seems contrary to the apparent waiver of such a requirement in subsection 3641(a)(2).

The Commission has previously acknowledged, with respect to market tests, that:

[i]n marketing the experimental product, presumably the Postal Service will elaborate on the nature of the services and accompanying benefits to mailers and encourage use of the service.

Docket No. MT2012-1, Order No. 1035 at 5. Thus, there is every reason to expect, as the Commission apparently already does, that the Postal Service will communicate the nature and availability of an experimental product by whatever means are likely to most effectively make potential users aware of its existence.

Accordingly, the Postal Service is concerned that requiring a product concept undergoing such testing to be defined in the MCS at the outset of an experiment with the specificity required for permanent products may obstruct useful innovation. First, the requirement to formalize the market test description could unduly extend market test

concept development and the preparation time for market test notices. Second, the requirement could force the Postal Service to innovate in an inflexible manner, without a reasonable opportunity to mold or shape a product concept during the course of a test.

As the Commission has previously acknowledged:

A more in-depth examination of the service would be appropriate if the Postal Service were to propose to make . . . [it] a permanent product.

Id. Accordingly, the Postal Service urges the Commission to reconsider proposed Rule 3035.3(b)(5), insofar as it is intended to require detailed MCS language as a prerequisite to testing. Requiring that a market test begin with a determination of the proper place in the Mail Classification Schedule for a potential permanent product, or the precise character of the permanent change that might be made if the market test ultimately leads to such a decision, would be overly restrictive and inconsistent with the framework Congress established for conducting experiments. The Postal Service favors continuation of the current practice of listing experimental products in the Mail Classification Schedule in the same manner as it does today: providing the name of the product, identifying the Commission order authorizing its offering, and specifying its current expiration date.

II. *Data Reporting Obligations*

Under proposed Rules 3035.20(a)(2) and (3), the Postal Service is expected to periodically report “administrative” and “ancillary” and “start-up” costs associated with each market test it implements.

Administrative and Ancillary Costs

Although PRC Orders No. 1035 and No. 1539 are referenced at page 11 of the Notice of Proposed Rulemaking as precedent, it is noteworthy that neither Order offers insight into what types of costs the Commission regards to be either “administrative” or “ancillary” within the meaning of proposed Rule 3035.20(a)(2). Before the proposal of this rule, the Postal Service has acted in good faith in its responses to Commission orders requiring the reporting of available “administrative” cost information in recent market test data collection reports.³ For example, as indicated in its April 19, 2013 data collection report in Docket No. MT2012-1 (First-Class Tracer), the Postal Service responded to the directive in Order No. 1035 to report “administrative” costs by providing data regarding the cost paid to its advertising agency for the production of postal lobby product display notices and retail materials necessary for provision of the experimental service being tested. However, in that instance, as with its May 24, 2013 data collection report filed under seal in Docket No. MT2013-1 (Metro Post), the Postal Service submitted responsive “administrative” information without confidence that it was being fully responsive to the Commission’s expectations. Neither of the above-referenced Commission orders specified the nature and scope of “administrative” activity for which cost data should be reported. To-date, this rulemaking offers no further clarity.

Likewise, the above-referenced Docket No. MT2013-1 (Metro Post) data collection report responds to the Order No. 1539 directive to provide available “ancillary” cost data. Notwithstanding its effort to fulfill the obligation in that instance, the Postal

³ See, e.g., Docket No. MT2012-1, USPS Data Collection Report on the First-Class Tracer Market Test (April 19, 2013); Docket No. MT2013-1, USPS Data Collection Report on the Metro Post Market Test (May 24, 2013)(filed under seal).

Service still lacks a clear understanding of the types of costs the Commission deems to fall within this category. It would be helpful if this rulemaking could produce further clarity regarding the Commission's expectations in this regard. The Postal Service could then comment on the feasibility of fulfilling any proposed obligation.

Start-Up Costs

Proposed Rule 20(a)(3) seeks to require periodic reporting of "start-up costs." Notwithstanding its efforts to report such costs on May 24, 2013 in the above-referenced Docket No. MT2013-1 (Metro Post) data collection report, the Postal Service confesses that it is not necessarily always easy in the early stages of a market test to distinguish "start-up" from "administrative" activity and, therefore, whether associated costs should be categorized as one or the other.⁴ Reasonable minds within the Postal Service may disagree and, in the absence of clearer guidelines, differences from one market test to another may find their way into the assembly of data aggregated for reporting to the Commission.

It is possible that the proposed rule assumes the existence of project-specific timekeeping systems for postal management employees who perform tasks related to a particular test. Where discrete tasks relating to conception, consultation or implementation are performed by postal contractors who report to a postal manager, it will often be the case that specific contract tasks are documented for which discrete costs can be isolated and reported. However, that is less likely to be so for the activities of many postal management employees who have diverse project portfolios, who are

⁴ The title of a currently popular song by Robin Thicke comes to mind.

not subject to task-based timekeeping systems that record workhours consisting of such potential “administrative” or “ancillary” or “start-up” activities as:

- cogitation or consultation about a specific product concept,
- participation in the quest for senior postal management approval,
- internal review and approval by senior management,
- preparation for and litigation of a market test case before the Commission,
- implementation of an approved test, or
- administration of an ongoing test.

It is likely to be much easier to estimate the proportion of time that an individual headquarters market test project manager devotes to a specific test⁵ than to systematically record and calculate the value of the workhours devoted by other headquarters or field management employees who, on an *ad hoc* basis, are called upon to perform significant supporting “start-up”⁶ tasks at different stages of a test from its conception until its completion.

Whatever rules emerge from this docket, the Postal Service considers it important that the Commission’s “administrative” and “ancillary” and “start-up” cost data reporting requirements recognize the existence of limits on the Postal Service’s ability to report perfectly complete information that may vary on a case-by-case basis. If, within each of these categories, there are specific cost line items in which the Commission has an interest, it would be helpful if they could be more precisely identified. The Postal

⁵ But even then, only after the concept’s development is far enough down the line that its submission to the Commission for review is imminent.

⁶ Or “administrative” or “ancillary.”

Service then would be better positioned to comment on the relative ease or feasibility of collecting and reporting responsive data.

III. Timeliness of Market Test Extension Applications

Subsection 3641(d)(2) requires that any Postal Service application for extension of a market test beyond the standard 24-month duration be submitted to the Commission “no later than 60 days before the date as of which the testing of such product would otherwise be scheduled to terminate” To implement this requirement, the Commission proposes Rule 3035.11(a), the substance of which causes the Postal Service no concern. At page 7 of its Notice of Proposed Rulemaking, the Commission references the above-cited statutory basis for the rule in emphasizing the need for stricter compliance by the Postal Service in the future. The Postal Service respects the Commission’s authority to hold it accountable for stricter compliance with the statutory advance notice requirement. However, it appears that the Commission inadvertently listed Docket No. MT2013-2 as an example of non-compliance. The application for an extension beyond the standard 24-month test period in that docket can be found on page 6 of the July 1, 2013 market test notice filed by the Postal Service.⁷ In light of the test’s scheduled duration, the timing of that application satisfied the 60-day advance notice requirement.

⁷ See, Docket No. MT2013-2, Notice of the United States Postal Service of Market Test of Experimental Product International Merchandise Return Service (July 1, 2013).

IV. Conclusion

The Postal Service appreciates the opportunity to advise the Commission in this rulemaking.

Respectfully submitted,

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